85-866

Supreme Court, U.S.
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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1985

DAVID BENTON HOLMES,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

WHETHER THE DECISION BELOW, WHICH HELD THAT WHERE THE PETITIONER, WHO WAS CONVICTED OF TWO SEPARATE NARCOTICS VIOLATIONS, WAS ENTITLED TO BE RESENTENCED ON ONE OF THOSE COUNTS ON THE GROUND THAT THE SENTENCE IMPOSED BY THE COURT EXCEEDED THE STATUTORY MAXIMUM, THE COURT, UPON RESENTENCING, COULD INCREASE THE SENTENCE IMPOSED UPON THE UNCHALLENGED COUNT, VIOLATES THE PETITIONER'S RIGHTS UNDER THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT AND UNFAIRLY PENALIZES HIM FOR EXERCISING HIS RIGHT TO APPEAL, IN VIOLATION OF THE PRINCIPLES EXPRESSED IN NORTH CAROLINA v. PEARCE, 395 U.S. 711 (1969).

LIST OF INTERESTED PERSONS

The only persons having an interest in the outcome of this case are the Petitioner, his family, and the United States of America.

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Petitioner, DAVID BENTON HOLMES, respectfully prays that a Writ of Certiorari issue to review the judgment, opinion, and order on rehearing of the United States Court of Appeals for the Eleventh Circuit, entered in Case No. 84-5220 on July 1, 1985, and September 19, 1985.

OPINION BELOW

The United States Court of Appeals for the Eleventh Circuit announced its opinion affirming the Petitioner's convictions on charges of conspiracy with intent to distribute marijuana in violation of 21 U.S.C. §§841 and 846 (1966), and attempted importation of marijuana into the United States contrary to 21 U.S.C. §§952(a) and 963 (1966) in United States v. Rosen, 764 F.2d 763 (11th Cir. 1985). The Court reversed and remanded the case for resentencing on the count charging attempted importation of marijuana, on the ground that the sentence imposed was excessive and held that upon resentencing, the Court could increase the sentence imposed on the count charging conspiracy with intent to distribute marijuana. Relevant portions of the opinion are reproduced in the Appendix. A Petition for Panel Rehearing was

denied by the Court on September 19, 1985. This Order is also reproduced in the Appendix.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). This petition is filed within the authorized time period following the Eleventh Circuit's Order on Rehearing.

CONSTITIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Fifth Amendment, Double Jeopardy Clause:

> Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb;

The U.S. Constitution, Fifth Amendment, Due Process Clause:

> Nor shall any person be deprived of life, liberty, or property, without due process of law;

21 U.S.C. §841(a)(1):

> (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally -

(1) to manufacture, distribute, or dispense or possess with intent to manufacture, distribute, or dispense, a controlled substance;

21 U.S.C. §841(b)(6):

(b) Except as otherwise provided in section 845 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(6) In the case of a violation of subsection (a) of this section involving a quantity of marihuana exceeding 1,000 pounds, such person shall be sentenced to a term of imprisonment of not more than 15 years, and in addition, may be fined not more than $125,000.

21 U.S.C. §846:

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

21 U.S.C. §952(a):

(a) It shall be unlawful to import into the customs territory of the United States from

any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in schedule I or II subchapter I of this chapter. . .

21 U.S.C. §960(a)(1):

(a) Any person who -

(1) contrary to section 952, 953, or 957 of this title, knowingly or intentionally imports or exports a controlled substance,... shall be punished as provided in subsection (b) of this section.

21 U.S.C. §960(b)(2):

(b)(2) In the case of a violation under subsection (a) of this section with respect to a controlled substance other than a narcotic drug in schedule I or II, the person committing such violation shall be imprisoned not more than five years, or be fined not more than $15,000, or both.

21 U.S.C. §963:

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the

commission of which was the object of the attempt or conspiracy.

STATEMENT OF THE CASE

Petitioner was convicted in the United States District Court for the Southern District of Florida of conspiracy to possess with intent to distribute more than 1,000 pounds of marijuana in violation of 21 U.S.C. §§841 and 846 (1966), and attempted importation of marijuana into the United States contrary to 21 U.S.C. §§952(a) and 963 (1966). Petitioner was sentenced to a term of five years imprisonment and a $15,000 fine on the count charging him with conspiracy and to a term of imprisonment of twelve years and a $25,000 fine on the count charging him with attempted importation.

On appeal, the government agreed with Petitioner's contention that the trial court erred in sentencing him to twelve years and fining him $25,000 on Count II, which charged him with

attempted importation of marijuana due to the fact that the maximum sentence for such a charge is five imprisonment and $15,000 fine. The only dispute was whether the whole sentence should be remanded for resentencing on both counts upon which HOLMES was convicted or whether resentencing should be restricted to the one count (App. 3-4).

On appeal, the United States Court of Appeals for the Eleventh Circuit held that the case should be remanded for sentencing on both counts and that upon resentencing, Petitioner could be sentenced to a greater term of imprisonment on the count charging conspiracy to possess with intent to distribute more than 1,000 pounds of marijuana. In doing so, the Court rejected Petitioner's argument that to resentence him to a harsher sentence on a count for which he had already begun serving his

sentence of imprisonment would violate his rights under the Double Jeopardy Clause to the Fifth Amendment to the United States Constitution. In addition, the Court distinguished the prior decision in Chandler v. United States, 468 F.2d 834 (5th Cir. 1972) as follows:

> Alleging that a double jeopardy violation will occur if the district court resentences him for a conviction on Count I, affirmed on this appeal, Holmes relies on Chandler v. United States, 468 F.2d 834 (5th Cir. 1972). There, the Defendant filed a motion pursuant to 28 U.S.C.A. §2255 to vacate or set aside the illegal sentence on one count of her multi-count conviction. The district court reduced the sentence challenged from five to three years, but then increased the sentence on an unchallenged count from two to five years. We held the sentence increase on the unchallenged count to be a violation of the Double Jeopardy Clause of the Fifth Amendment.
>
> In our judgment, however, there is a difference between a collateral attack on a particular sentence under Fed.R.Crim.P. 35 or 28 U.S.C.A. §2255, and a

> direct appeal from multiple-count convictions. With a collateral attack, only a specific sentence on a specific count is before the district court. The narrow scope of review on a collateral attack is almost jurisdictional nature. The court has power only over what is brought before it. On a direct appeal, however, none of the sentences has become final and the appellate court has all sentences before it. 28 U.S.C.A. §2106. In Chandler, the conviction and sentence on the unchallenged count had been affirmed through the appellate process and was not before the district court on the §2255 petition. Here all aspects of HOLMES' convictions and sentences are before the court on this appeal.

(App. 8-10)

On rehearing, Petitioner pointed out to the United States Circuit Court that the distinction it had drawn between a direct appeal and a collateral attack penalized him for exercising his right to appeal. Petitioner explained that under the Circuit Court's rationale, had he foregone his right to

a direct appeal and, instead, filed a motion to vacate the illegal sentence under 28 U.S.C. §2255 or Fed.R.Crim.P. 35, then the trial court would have been required to reduce his sentence on Count II without being permitted to increase his sentence on Count I. Under these circumstances, Petitioner contended that the decision of the Circuit Court penalized him for exercising his right to appeal in violation of the principles espoused in North Carolina v. Pearce, 395 U.S. 711 (1969). This contention was rejected with the denial of rehearing in this case. (App. 14)

REASONS FOR GRANTING THE WRIT

WHETHER THE DECISION BELOW, WHICH HELD THAT WHERE THE PETITIONER, WHO WAS CONVICTED OF TWO SEPARATE NARCOTICS VIOLATIONS, WAS ENTITLED TO BE RESENTENCED ON ONE OF THOSE COUNTS ON THE GROUND THAT THE SENTENCE IMPOSED BY THE COURT EXCEEDED THE STATUTORY MAXIMUM,

THE COURT, UPON RESENTENCING, COULD INCREASE THE SENTENCE IMPOSED UPON THE UNCHALLENGED COUNT, VIOLATES THE PETITIONER'S RIGHTS UNDER THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT AND UNFAIRLY PENALIZES HIM FOR EXERCISING HIS RIGHT TO APPEAL, IN VIOLATION OF THE PRINCIPLES EXPRESSED IN NORTH CAROLINA v. PEARCE, 395 U.S. 711 (1969).

As this Court has repeatedly stated, the Double Jeopardy Clause of the Fifth Amendment serves three primary purposes. First, it protects against a second prosecution for the same offense after an acquittal. Second, it protects against a second prosecution for the same offense after a conviction. Third, it protects against multiple punishment for the same offense. See, e.g., North Carolina v. Pearce, 395 U.S. 711, 717 (1969); Brown v. Ohio, 432 U.S. 161, 165 (1977). This last protection is what is implicated in the case at bar. The Court stated the controlling

constitutional principal more than 100 years ago in the landmark case of Ex Parte Lange, 85 U.S. (18 Wall) 163, 168 (1874):

> If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense. And...there has never been any doubt of [this rule's] entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offense.

This Court went on to hold that the Constitution was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried for it and established the clear proposition that once a criminal defendant has begun serving a sentence imposed by the Court, the Court may not, consistent with the Double Jeopardy Clause of the Fifth Amendment, increase that sentence.

In the case at bar, it is clear that the Petitioner has already served well over a year of his five-year sentence imposed on Count I of the indictment, charging him with conspiracy to possess with intent to distribute marijuana and that, therefore, the Circuit Court's holding which permits him to be resentenced to a greater penalty on that count violates the principal of law established in Ex Parte Lange, supra. See also United States v. Benz, 282 U.S. 304, 307 (1931).

In rejecting Petitioner's double jeopardy claim, the United States Court of Appeals for the Eleventh Circuit acknowledged the decision of the prior Fifth Circuit Court of Appeals in Chandler v. United States, 468 F.2d 834 (5th Cir. 1972), in which that Court held, under similar circumstances, that the increase of a sentence on an unchal-

lenged count was a violation of the Double Jeopardy Clause of the Fifth Amendment and acknowledged that the decision in Chandler continues to be followed by the present Fifth Circuit. See United States v. Henry, 709 F.2d 298 (5th Cir. 1983)(en banc). In rejecting those decisions, the Court reasoned as follows:

> Alleging that a double jeopardy violation will occur if the district court resentences him for a conviction on Count I, affirmed on this appeal, Holmes relies on Chandler v. United States, 468 F.2d 834 (5th Cir. 1972). There, the Defendant filed a motion pursuant to 28 U.S.C.A. §2255 to vacate or set aside the illegal sentence on one count of her multi-count conviction. The district court reduced the sentence challenged from five to three years, but then increased the sentence on an unchallenged count from two to five years. We held the sentence increase on the unchallenged count to be a violation of the Double Jeopardy Clause of the Fifth Amendment.

> In our judgment, however, there is a difference between a collateral attack on a particular sentence under Fed.R.Crim.P. 35 or 28 U.S.C.A. §2255, and a direct appeal from multiple-count convictions. With a collateral attack, only a specific sentence on a specific count is before the district court. The narrow scope of review on a collateral attack is almost jurisdictional nature. The court has power only over what is brought before it. On a direct appeal, however, none of the sentences has become final and the appellate court has all sentences before it. 28 U.S.C.A. §2106. In Chandler, the conviction and sentence on the unchallenged count had been affirmed through the appellate process and was not before the district court on the §2255 petition. Here all aspects of HOLMES' convictions and sentences are before the court on this appeal.

(App. 8-10).

Petitioner submits that the distinction drawn by the Circuit Court between a direct appeal and a collateral proceeding is invalid. The plain fact is that the Petitioner never challenged the legality of his sentence on Count I

of the indictment. Although Petitioner did challenge his conviction on that count, the Circuit Court affirmed and from a practical point of view, the case stood in the same posture, vis-a-vis the sentencing issue, as if that issue were being raised in the collateral proceeding. Certainly, insofar as the Double Jeopardy Clause is concerned, any distinction drawn between a collateral proceeding and a direct appeal not only is completely artificial, but has no bearing on whether a resentencing will violate a defendant's rights. Accordingly, Petitioner submits that despite the distinction which the Circuit Court attempted to draw on this case, its decision is in conflict with the cited decisions of the Fifth Circuit Court of Appeal and that this Court should exercise its discretion by granting review in order to resolve the conflict. See Rule 17.1(a).

Petitioner also submits that the holding of the Circuit Court of Appeals effectively penalizes him for exericising his right to appeal in violation of the Due Process Clause of the Fifth Amendment to the United States Constitution, as interpreted in North Carolina v. Pearce, supra. Under the reasoning adopted by the Circuit Court, Petitioner should have deferred a challenge to the illegality of his sentence on Count II until after his appeal had been concluded or taken a voluntary dismissal of his appeal. He then would have been free to challenge his illegal sentence on Count II under Fed.R.Crim.P. 35 or 28 U.S.C. §2255 without any fear of facing an enhanced sentence on Count I. However, because HOLMES chose to exercise his right to appeal and to challenge his illegal sentence on Count II, the Circuit Court has imposed a sanction

which otherwise could not have been inflicted upon him.

Indeed, Petitioner respectfully suggests that by drawing a distinction between a direct appeal and a collateral attack on the sentence, the Circuit Court is sending a clear signal to future litigants that they should not challenge the legality of their sentences on direct appeal, but should deliberately hold back such claims for collateral attack so as to avoid Petitioner's misfortune. The inevitable result is that the District Courts will be further overburdened by the piecemeal litigation of sentencing claims which could more easily be resolved in a single proceeding, on direct appeal. Such a result is inconsistent with public policy, which should encourage the expeditious review of all claims in a single proceeding. At the very least,

this Court should exercise its discretion by accepting jurisdiction over this case in order to establish a consistent, nationwide policy with respect to these resentencing issues.

CONCLUSION

For the above-stated reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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By _____
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APPENDIX

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

Richard A. ROSEN, Robert Esson Rew and David Benton Holmes,
Defendants-Appellants.

No. 84-5220.

United States Court of Appeals,
Eleventh Circuit.

July 1, 1985.

Defendants were convicted in the United States District Court for the Southern District of Florida, Norman C. Roettger, Jr., J., of various charges involving conspiracy, attempt, and importation relating to the smuggling of marijuana into the United States, and they appealed. The Court of Appeals held that: (1) evidence, which established that defendants flew an aircraft to Jamaica to pick up a load of marijuana but returned empty a day later apparently because of a scheduling prob-

lem, was sufficient to convict defendants of conspiracy and attempt; (2) evidence was sufficient to support defendant's marijuana importation conviction; and (3) where, on direct appeal, it was determined that each defendant's sentence on one count of multiple-count convictions exceeded statutory maximum and where each defendant's sentences stemmed from same criminal transaction and were thus interdependent, their whole sentences would be remanded for resentencing.

Affirmed in part, vacated in part, and remanded.

* * *

Appeals from the United States District Court for the Southern District of Florida.

Before RONEY and TJOFLAT, Circuit Judges, and BROWN, Senior Circuit Judge.

PER CURIAM:

Defendants Rosen, Rew and Holmes were convicted of various charges involving conspiracy, attempt, and importation relating to the smuggling of marijuana to the United States from Jamaica. On appeal defendants claim (1) insufficiency of the evidence; (2) inconsistency of the evidence with the charges in the indictment; and (3) erroneous sentencing in that the statutory maximum sentence for importation or attempted importation was exceeded. We affirm the convictions but hold the statutory maximum sentences were exceeded, which the Government does not contest, and remand to the district court for resentencing.

* * *

[6] The Government agrees with defendant Holmes that the trial court erred in sentencing him to 12 years and fining him $25,000 on Count II, which

charged him with intent to import marijuana. The maximum sentence for such a charge is five years imprisonment and a $15,000 fine. 21 U.S.C.A. §§960(b)(2); 963. The only dispute is whether the whole sentence should be remanded for resentencing on both counts in Holmes' conviction or whether resentencing should be restricted to the one count. Holmes' sentence was as follows:

> FIVE (5) YEARS as to Count 1. It is adjudged that on Count 2 that the defendant is hereby committed to the custody of the Attorney General ... for imprisonment for a term of TWELVE (12) YEARS. It is the further order of this Court that the defendant is fined the sum of $15,000 as to Count 1, and $25,000 as to Count 2. The fine in Count 2 is cumulative to that in Count 1....

The court could possibly have given a heavier sentence on Count I. The enhanced penalty provision of 21 U.S.C.A. §841(b)(6) was applicable there, because more than 1,000 pounds of

marijuana was involved, but could not affect Count II.

The Third Circuit has held that in a direct appeal from multiple count criminal convictions, where the several sentences are interdependent, an appellate court may vacate all sentences even if only one is reversed on appeal. United States v. Busic, 639 F.2d 940, 947 (3rd Cir.), cert. denied, 452 U.S. 918, 101 S.Ct. 3055, 69 L.Ed.2d 422 (1981). There, defendants LaRocca and Busic were convicted on a multi-count indictment of narcotics and possession of firearms counts, and on two counts of armed assault on federal officers is violation of 18 U.S.C.A. §111. LaRocca was the triggerman and Busic an aider and abettor, although derivatively a principal under 18 U.S.C.A. §2. LaRocca was also convicted of using a firearm in a felony, 18 U.S.C.A. §924(c)(1), and

Busic of carrying a firearm during a federal felony in violation of 18 U.S.C.A. §924(c)(2). They were sentenced to a total of 30 years imprisonment: five years on concurrent narcotics sentences, five as concurrent terms on the firearms and assault charges, and twenty for the §924(c) violations.

After a granting of rehearing, at which it was determined that LaRocca's sentence could not be augmented under both section 111 and section 924(c), then a reversal and remand by the Supreme Court, see Busic v. United States, 446 U.S. 398, 100 S.Ct. 1747, 64 L.Ed.2d 381 (1980), which vacated the sentences imposed under section 924(c), the question before the court was whether it could vacate not only the erroneous section 924(c) sentences, but also those lawfully imposed under section 111. As in the instant case, the

Government sought remand on the unchallenged counts because under those counts the district court could resentence the defendants under a special enhancement provision. The Supreme Court had noted the problem of remanding unchallenged counts for resentencing but refused to address it. Busic, 446 U.S. at 412, n. 19, 100 S.Ct. at 1756 n. 19.

The circuit court in Busic carefully analyzed the issue for double jeopardy concerns and found none. There was no question of multiple punishments for the same offense, only a resentencing to replace a sentence held invalid by the Supreme Court. 639 F.2d at 947. See also North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969); United States v. Hodges, 628 F.2d 350 (5th Cir. 1980). The Court held that all sentences, challenged or not, could be remanded for resentencing

"which may be greater than, less than, or the same as the original sentence." 639 F.2d at 953. To the argument that the court could not remand an unchallenged sentence, the court noted that "[w]hen a defendant challenges one of several interdependent sentences, he, in effect, challenges the entire sentencing plan." 639 F.2d at 947, n. 10.

Such is the case here. Holmes is challenging his entire conviction on direct appeal, not simply his sentence on Count II. His sentences are interdependent. They stem from the same criminal transaction.

Alleging that a double jeopardy violation will occur if the district court resentences him for a conviction on Count I, affirmed on this appeal, Holmes relies on Chandler v. United States, 468 F.2d 834 (5th Cir. 1972). There, the defendant filed a motion

pursuant to 28 U.S.C.A. §2255 to vacate or set aside the illegal sentence on one count of her multi-count conviction. The district court reduced the sentence challenged from five to three years, but then increased the sentence on an unchallenged count from two to five years. We held the sentence increase on the unchallenged count to be a violation of the double jeopardy clause of the Fifth Amendment.

In our judgment, however, there is a difference between a collateral attack on a particular sentence under Fed.R. Crim.P. 35 or 28 U.S.C.A. §2255, and a direct appeal from multiple count convictions. With a collateral attack, only a specific sentence on a specific count is before the district court. The narrow scope of review on a collateral attack is almost jurisdictional in nature. The Court has power only over

what is brought before it. On a direct appeal, however, none of the sentences has become final and the appellate court has all sentences before it. 28 U.S.C.A. §2106. In Chandler, the conviction and sentence on the unchallenged count had been affirmed through the appellate process and was not before the district court on the §2255 petition. Here, all aspects of Holmes' convictions and sentences are before the Court on this appeal.

The Government would have us rely on Johnson v. United States, 619 F.2d 366 (5th Cir. 1980), in which the court, on a collateral attack against two of three sentences, remanded on the single valid sentence, even though a remand was not requested, because the "District Court should at least be able to reconsider" whether its sentence on that count was too "harsh". 619 F.2d at

368. Johnson would be binding on this Court, Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981), even though it may have been overruled after October 1, 1981 by the current Fifth Circuit in United States v. Henry, 709 F.2d 298, 318 (5th Cir. 1983) (En banc) (Jolly, J. concurring). It is hard to square Johnson with Chandler, however, except to note that the Johnson appellate court focused on the reduction of the sentence which, of course, would raise no double jeopardy problems about which the defendant could complain.

[7] In any event, we do not rely on Johnson, but follow here the careful reasoning of the Third Circuit in Busic as the correct rule on a direct appeal. Sentencing on a multi-count conviction is an interrelated and intertwined process because of the statutory provisions for concurrent and consecutive

sentences. See generally, Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C.A. §801 et seq. Where an entire conviction is challenged on direct appeal, double jeopardy and due process are not implicated when all sentences, both proper a d improper, are remanded, because of the holistic nature of the trial judge's sentencing decision. Multiple count convictions present the trial judge with the need for a sentencing scheme which takes into consideration the total offense characteristics of a defendant's behavior. When that scheme is disrupted because it has incorporated an illegal sentence, it is appropriate that the entire case be remanded for sentencing.

* * *

Defendants Holmes', Rew's and Rosen's sentences on all counts are vacated and remanded to the district

court for resentencing within the statutory maximum for each offense.

AFFIRMED in part, VACATED in part, and REMANDED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-5220

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RICHARD A. ROSEN,
ROBERT ESSON REW and
DAVID BENTON HOLMES,

Defendants-Appellants

Appeal from the United States
District Court for the Southern
District of Florida

ON PETITION FOR REHEARING
(September 19, 1985)

Before RONEY, TJOFLAT and BROWN*, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

s/s PAUL H. RONEY
United States Circuit Judge

*Honorable John R. Brown, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.